79-499

No. 79-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

EASTMAN KODAK COMPANY,

Petitioner,

v.

BERKEY PHOTO, INC.,

Respondent.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Eastman Kodak Company ("Kodak") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit insofar as it remanded for retrial certain claims against Kodak under § 2 of the Sherman Act, the writ to issue only in the event the Court should grant the petition for a writ of certiorari in No. 79-427.

Opinions Below

The opinion of the court of appeals (3a-101a)[1] is unofficially reported at [1979-1] TRADE CASES (CCH) ¶ 62,718. The opinions of the district court (102a-179a) are reported at 457 F. Supp. 404.

[1] The opinions below are reproduced in a separate appendix volume submitted with the petition in No. 79-427, and "—a" page references are to that volume.

Jurisdiction

The judgment of the court of appeals was entered on June 25, 1979 (1a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Did the court of appeals err in not entering judgment for Kodak on the film and color print paper claims, and instead remanding both claims for a determination of whether "conduct occurring many years before the commencement of suit contributed to an overcharge . . . within the limitations period" (75a)?

2. Should judgment have been entered for Kodak on the photofinishing services and equipment claims, since "it is clear that Kodak did not monopolize or attempt to monopolize" those markets (58a)?

Statutes Involved

Section 2 of the Sherman Act, 26 Stat. 209, as amended, 88 Stat. 1708, 15 U.S.C. § 2; Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15; Section 4B of the Clayton Act, 69 Stat. 283, 15 U.S.C. § 15b; and Section 16 of the Clayton Act, 38 Stat. 737, as amended, 90 Stat. 1396, 15 U.S.C. § 26, are set forth as an addendum hereto.

Statement of the Case

Plaintiff Berkey Photo, Inc. ("Berkey") claims that Kodak should be held liable in treble damages under § 4 of the Clayton Act for "overcharges" on film and paper purchased by Berkey from Kodak in and after 1969.

Berkey also claims treble damages in connection with Kodak's sale of photofinishing services and equipment pertaining to a new photographic system introduced by Kodak in 1972, and, under § 16 of the Clayton Act, injunctive relief relating to the photofinishing business. All such claims for relief are based on alleged violations of § 2 of the Sherman Act.[2]

The district court[3] held that Kodak could be liable on Berkey's "overcharge" claims only for unlawful conduct continued into or occurring within the 4-year period of limitations prescribed by § 4B of the Clayton Act, a period commencing in 1969. The district court did, however, allow Berkey to introduce, for "background" purposes, evidence of alleged unlawful acts occurring prior to 1969—principally the introduction by Kodak in 1963 of the "Instamatic" system and a 1954 consent decree pertaining to processing of color photography (see 9a-13a). Evidence was also ultimately received on certain actions taken by Kodak as far back as the turn of the century (91a-94a).

Berkey's principal claim of unlawful conduct within the statutory period was that Kodak violated § 2 of the Sherman Act by its introduction in 1972 of a subminiature camera, the "Pocket Instamatic," and a new film size and new fine-grain color film, "Kodacolor II," for use with it. This new "110" system allegedly injured Berkey in a number of markets, including the film and paper markets. With respect to the paper market, however, Berkey primarily attacked Kodak's 1971 introduction of a new, faster "3-step" paper and process.

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[2] This petition does not seek review of the rulings below with respect to Berkey's claims based on § 1 of the Sherman Act.

[3] The district court had jurisdiction under 28 U.S.C. § 1331(a), 15 U.S.C. § 15 and 15 U.S.C. § 26.

Berkey did not allege or prove that these or any other allegedly unlawful acts were connected with any increment in the prices of Kodak's film or paper, or that any relationship existed between the alleged violations and prices. It was also undisputed that competing products were available for purchase by Berkey throughout the statutory period and at lower prices.

Berkey received verdicts in the amounts, before trebling, of $11,250,000 on "overcharges" for all types and sizes of Kodak film purchased by Berkey from 1969 through 1977, $8,803,000 on "overcharges" of color print paper from 1969 through 1977, $19,000 on "overcharges" for photofinishing equipment in 1972, and $55,700 for lost photofinishing profits in 1972 (188a-189a).

The district court granted Kodak's motion for judgment notwithstanding the verdict on the paper claim, but sustained the film award (126a-138a). The district court also sustained the photofinishing awards, despite the fact that Kodak had not been found to have monopolized or attempted to monopolize the photofinishing or photofinishing equipment markets (120a-122a, 138a-140a), and it awarded injunctive relief as well (147a, 155a).

The court of appeals held, *inter alia,* that the 1972 introduction of the 110 system was not unlawful, that neither that introduction nor the single other violation found by the district court could "have had a very large impact on Kodak's film prices" (75a) and that the district court had erred as to the measure of damages (71a-74a). The court also held, however, that conduct wholly antedating the period of limitations could provide the basis for recovery, and remanded the film claim for a new trial (67a-71a, 75a). For the same reason, it remanded the paper claim for retrial (*ibid.*).

The court of appeals also remanded the photofinishing claims for determination of whether Kodak had "gained a competitive advantage" in those markets by use of monopoly power in other markets (56a-61a).

Reasons for Granting the Writ

Since the court of appeals' rulings on Berkey's film, paper and photofinishing claims are interlocutory and further proceedings below may (and we expect, will) render them moot as between the parties, the Court might consider that the questions here presented do not now warrant review on certiorari. But if the Court determines to grant Berkey's petition in No. 79-427, it should consider these questions as well.

I.

The decision below negates the statute of limitations and is contrary to the controlling decisions of this Court, the decisions of other circuits, and the common law.

The holding below that damages may be awarded solely on the basis of "conduct occurring many years before the commencement of suit" (75a) is contrary to controlling decisions of this Court. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971):

> "Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business."

Here, Berkey has claimed that every violation, whenever occurring, had the immediate effect of maintaining monopoly power and prices. The cause of action as to each alleged violation consequently accrued at the time of the act.

Berkey's contention that pre-1969 conduct had continuing effect into the statutory period provides no basis for an exception to the established rules of accrual.[4] The holding below to the contrary conflicts with decisions by courts of appeals in other circuits under the Clayton Act. *See Poster Exchange Inc.* v. *National Screen Service Corp.*, 517 F.2d 117, 128 (5th Cir. 1975):

> "[A] . . . claim for damages must be based on some injurious act actually occurring during the limitations period, not merely the abatable but unabated inertial consequences of some pre-limitations action." [5]

See also AMF, Inc. v. *General Motors Corp.*, 591 F.2d 68 (9th Cir. 1979); *Harold Friedman Inc.* v. *Thorofare Markets Inc.*, 587 F.2d 127, 139 n.45 (3d Cir. 1978). It also conflicts with the common law, *e.g., Northern Ky. Tel. Co.* v. *Southern Bell Tel. & Tel. Co.*, 73 F.2d 333, 335 (6th Cir. 1934), *cert. denied*, 294 U.S. 719 (1935):

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[4] A cause of action does not accrue when an unlawful act is first committed only in two circumstances: (1) when accrual of the cause of action is delayed because of the uncertainty of injury and damage, *Zenith*, 401 U.S. at 339, and (2) where the tort is one actually continuing into the statutory period, such as overt acts in furtherance of a prior conspiracy or continued enforcement of unlawful agreements, *id.* at 338; *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 502 n.15 (1968).

[5] *See also* the authorities cited by this Court in *Zenith, e.g., Momand* v. *Universal Film Exchange*, 43 F. Supp. 996, 1006 (D. Mass. 1942) (Wyzanski, J.), *aff'd*, 172 F.2d 37, 49 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949); *Farbenfabriken Bayer, AG* v. *Sterling Drug, Inc.*, 153 F. Supp. 589, 593 (D.N.J. 1957), *modified on other grounds*, 197 F. Supp. 627 (1961), *aff'd*, 307 F.2d 210 (3rd Cir. 1962), *cert. denied*, 372 U.S. 929 (1963):

> "The victim of the conspiracy may continue to suffer damage long after the last overt act has been committed, but, if he is to preserve his cause of action, he must commence suit within the period defined by the applicable statute of limitation."

> "[W]hen there is an overt act, or the last of a contemplated series of overt acts, the cause of action accrues and the statute of limitations begins to run. If this were not true, then it would result that, in every case where damages resulting from a wrongful act are in their nature continuing, there would be no limitation upon the right of action, and the beneficent purpose of the statute to put a period to the right to sue would be defeated."

Congress clearly had this "beneficent purpose" in mind in enacting a "uniform four year statute of limitations" for private antitrust damage actions. *See* 101 Cong. Rec. 5132-33 (1955) (rejecting an amendment delaying "accrual" until discovery, because the "defendant would be put in a rather deplorable situation" if he had to defend conduct engaged in more than four years prior to suit).

The rule enunciated below in large measure defeats the function of a statute of limitations as a statute of peace and repose, *United States* v. *Marion*, 404 U.S. 307, 322-23 n.14 (1971); *Chase Sec. Corp.* v. *Donaldson*, 325 U.S. 304, 314 (1945); *Order of R.R. Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944), and, in the context of alleged monopoly "overcharges," necessarily confronts major business enterprises with an unavoidable dilemma. A corporate manager can only price his product—in the case of amateur film, a discretionary consumer expenditure—in terms of existing market conditions; he cannot alter reality to determine what the product might sell for if his predecessors had not years before engaged in some act now alleged to be monopolistic. To require him to labor daily under the yoke of past alleged misdeeds is not to do human justice but to impose an unjust and bewildering ordeal in which rational economic behavior is condemned.

This is not a case where the fact and quantification of injury by reason of old allegedly wrongful acts were even arguably speculative until some time within the statutory period. Consequently, not only is there no basis for permitting inquiry into alleged past misdeeds because recovery could not have been had earlier (see note 4, page 6 above), but there is every reason to believe that the failure of Berkey or anyone else to sue earlier was due to their recognition that no actionable conduct had in fact occurred. *See United States* v. *Marion*, 404 U.S. at 322-23 n.14, citing *Riddlesbarger* v. *Hartford Insurance Co.*, 7 Wall. 386, 390 (1869): "statutes [of limitations] 'are founded upon the general experience of mankind that claims, which are valid, are not usually allowed to remain neglected.' "

II.

Because Kodak did not monopolize or attempt to monopolize the photofinishing markets, it did not violate § 2 of the Sherman Act in those markets.

Kodak at all relevant times possessed less than 15% of the market for photofinishing services, and no attempt was even made to define a photofinishing equipment market. The damage verdicts in both markets—based on Kodak's headstart in sales of "110" photofinishing services and equipment in 1972—were grounded in Berkey's theory that Kodak, though not monopolizing or attempting to monopolize the markets, had gained a "competitive advantage" in them by virtue of introducing the 110 system in 1972. (120a-122a)

Such a "competitive advantage," cannot be unlawful under § 2 unless it amounts to monopolization or attempted monopolization, for the statute on its face prohibits no

other type of non-conspiratorial conduct. This Court's decision in *United States* v. *Griffith*, 334 U.S. 100 (1948), relied upon below (22a-25a; 56a-61a) is not to the contrary, and were it, the plain language of the statute would nonetheless control.

Conclusion

If a writ of certiorari should issue to the United States Court of Appeals for the Second Circuit, it should issue to review those aspects of the court's decision discussed above.

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Addendum

Text of Statutes Involved

Section 2 of the Sherman Act, 26 Stat. 209, as amended, 88 Stat. 1708, 15 U.S.C. § 2, provides:

> "§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15, provides:

> "§ 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 4B of the Clayton Act, 69 Stat. 283, 15 U.S.C. § 15b, provides:

> "§ 4B. Any action to enforce any cause of action under sections 4, 4A or 4C shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act."

Section 16 of the Clayton Act, § 38 Stat. 737, as amended, 90 Stat. 1396, 15 U.S.C. § 26 provides:

> "§ 16. Any person, firm, corporation, or association shall be entitled to sue and have injunctive relief, in any court of the United States having jurisdiction over the parties, as against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven, and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff. . . ."